

## Secured Transactions Texas.

To put it in perspective. The situation is that you want to get a loan and you want to borrow money or obtain goods or services on credit. You want to, in other words, become a law student...er I mean a debtor.

Thus you must look at the option for the potential creditors:

(1) Outright refusal; (2) Obtain mere promise to pay (become an unsecured creditor); (3) Obtain a surety; (4) Obtain collateral.

Becoming an unsecured creditor. This is just getting a mere promise to pay. It is also called a general creditor. If the debtor fails to pay, the creditor must bring suit, get a judgment, and have the sheriff seize enough of the debtor's non-exempt property to satisfy the judgment. This is extremely expensive and it's time consuming.

In order to obtain collateral, or becoming a secured creditor...The creditor might require that the debtor place some of the debtor's property at risk, so that if the debtor does not pay, the creditor may take the property.

The creditor may obtain a mortgage or deed of trust over the land, this is known as using real property as collateral.

The creditor may also obtain a security interest in the debtor's personal property under Article 9 of the UCC. This is known as personal property as collateral.

So now that the basics are covered, how do you approach a secured transactions problem? There are six initial steps to take into consideration:

(1) Is the transaction within the scope of Article 9?; (2) Classify the collateral; (3) Determine if a security interest has been created, that is, has attachment occurred?; (4) Determine if the security interest has been properly perfected; (5) Determine the persons who are making claims to the collateral; (6) Apply proper priority rules and rules regarding repossession.

To determine whether the transaction is within the scope of article 9, look to the subject matter under Article 9:

(1) Collateral transactions; (2) Sales of Receivables; (3) Consignments; (4) Agricultural Liens created by statute; (5) Lease-Purchase agreements.

A collateralized transaction is any transaction, regardless of its form, which is intended to create a security interest in personal property or fixtures. The property used as collateral may be: (1) Already owned by the debtor; (2) to be acquired with a loan, that is, a purchase money security interest or PMSI. The lender and the seller are the same , or different, but are used to buy the item; (3) After-acquired. (future purchases).

A sales receivable is the outright sale of accounts, chattel paper, payment intangibles, and pin numbers, and these are all covered by Article 9.

A consignment is a bailment by the owner, or bailor, or consignor under which the bailee, or consignee has the authority to sell. The consignee appears to own the goods to the world, and therefore the true owner, or the consignor, may be required to comply with Article 9 to gain protection over the consignee's other creditors.

There are three specific scenarios of consignment which must comply with all of the requirements under Article 9: (1) Consigned goods that are worth a total of \$1,000 or more; (2) The consignor did not use the goods for personal, familial, or household purposes, regardless of the value of such goods they are considered consumer goods; (3) Potentially deceptive consignee.

If a consignee must be in a position to deceive potential creditors with consigned goods then he is known as a potentially deceptive consignee. This happens when: (1) the consignee deals with goods of that kind under a name other than the consignor's name; (2) The consignee is not an auctioneer, and; (3) The consignee is not generally known by the consignee's creditors to be substantially engaged in selling consigned goods.

next comes Agricultural Liens created by statute. Article 9 covers agricultural liens, which is to say, nonpossessory liens on farm products, such as crops and livestock created by state law in favor of a person who provides goods or services to a farmer.

A lease-purchase agreement must be distinguished from a true lease. Article 9 does not cover true leases of personal property in any manner whatsoever. Therefore, when a lease term is over, the lessor can recover the leased property without complying with article 9, and may do so free of the lessee's creditors. However, a lease which is actually an installment sale is

covered. The most common example would be a lease of a car. If the lease is short, for say 5 days, article 9 does not cover it. However, if the car is leased to own, then Article 9 controls.

Here are some more examples of lease-purchase agreements. The lessee cannot terminate the lease and: (1) the lease term is equal to or greater than the remaining economic life of the goods, or; (2) the lessee owns property at the end of the lease, or; (3) the lessee has an option to buy for nominal consideration at the end of the leased term.

The following six items are exclusions from Article 9: (1) Rights governed by federal law (such as ships, airplanes, intellectual property); (2) Real property (except for fixtures); (3) Tort claims (however, commercial tort claims are covered); (4) Deposits Accounts in Consumer Transactions (note, however, that business transactions are covered); (5) Statutory Liens (Mechanics lien, artisan's lien etc.); (6) Wage Assignments.

The importance of classification of collateral can be seen by the many rules regarding perfection, priority, repossession, resale, etc. It depends on the type of collateral involved.

Any particular item can only be on type of collateral, thus they are mutually exclusive. To classify collateral you must use the debtor's perspective. Thus the Debtor's use is determinative.

There are three primary types of classifications: (1) Goods; (2) Semi-tangible and intangible collateral; (3) Proceeds.

Goods in general are: (1) movable items and fixtures; (2) Specific inclusions (standing timber; growing crops; unborn young of animals); (3) Specific exclusions (money, mineral before extraction; and collateral that fits other categories).

The classification of goods includes: (1) Consumer Goods; (2) Equipment; (3) Inventory; (4) Farm Products; and (5) Multiple Uses Rule ("principle" use determinative).

Consumer goods are used for personal, family, or household purposes.

Goods will be classified as equipment when used for business purposes: (1) goods used or bought for use primarily in business (including farming or a profession); (2) Includes goods bought by a nonprofit organization or a governmental subdivision or agency; (3) Equipment is the default category. Thus, if a good

does not fit within the other three categories, then it is DEEMED to be equipment.

Goods will be classified as inventory when: (1) goods are held for sale or lease in the ordinary course of business; (2) raw material and work in progress; (3) Consumed materials.

Goods will be categorized as Farm Products when: for example crop and livestock are involved. To be a farm product, there are two requirements which must be satisfied: (1) possession by the farmer engaged in farming operations; and (2) in an un-manufactured condition.

There are 8 types of semi-tangible and intangible collateral: (1) Instruments; (2) Documents; (3) Chattel Paper; (4) Account; (5) Deposit Accounts; (6) Investment Property; (7) Commercial Tort Claims; (8) General Intangibles.

Semi-Tangible and Intangible collateral Inventory: are instruments which may represent money. This would be everything from the commercial paper outlines.

Semi tangible and intangible collateral documents are written or electronic representations of goods. That is to say, documents of title under Article 7. For example, a warehouse receipt-- goods in storage; and bill of landing, which would be goods in transit.

Semi-Tangible and Intangible Collateral as Chattel Paper. This is a single writing or groups of writings which evidence two things: (1) monetary obligations (such as promissory notes), plus; (2) Security interest in or Lease of Goods. If the chattel paper is stored on paper, it is called tangible chattel paper. If, on the other hand, the chattel paper is stored electronically, it is called, shockingly, electronic chattel paper.

Semi-Tangible and Intangible Collateral as an Account: (1) Any right to the payment of money for goods sold or leased or, for services rendered which is not evidenced by an instrument or chattel paper; (2) The typical accounts receivable of a business, or what your clients will owe you; (3) This includes contract rights which have not been earned by performance; and (4) includes computer software license fees and credit-card receivables.

Semi-Tangible and Intangible Collateral as Deposit accounts.

This is where the accounts are with a financial institution. These include checking and savings accounts.

Semi-tangible and intangible collateral as commercial tort claims. These are business tort claims which do not involve personal injury.

Semi-tangible and intangible collateral as investment property. This includes your stocks, bonds, mutual funds, etc.

Semi-tangible and intangible collateral as general intangibles. This includes any other form of personal property, except money, intellectual property, goodwill of a business, and sorry Al Capone...Liquor licenses as well.

Proceeds are whatever is received upon the sale, exchange, collection, or other disposition of collateral or proceeds. Thus proceeds may include collateral a creditor could not have a security interest in if it was originally used as collateral, such as cash--if the cash becomes proceeds it can be collateral, and this is the ONLY way cash would become a security interest.

Attachments require 3 elements which must all be satisfied before an attachment will occur. Note, however, that the elements of attachment may occur in ANY ORDER: (1) Creditor gave value; (2) Contract-which is the security agreement; (3) And rights, that is the debtor has rights in the collateral. An easy way to help you remember this is VCR.

A creditor gives value. In other words to deserve the security interest, the creditor must lend you money, or give you goods on credit. (kind of like the housing market! Credit works soooo well!)

the contract between the debtor and the creditor in which the debtor gives the creditor the security interest in the collateral is required for attachment. This Contract is the security agreement.

With regards to the security agreement the methods of proving the security agreement can be oral only if: (1) The collateral is in the creditor's possession; (2) This situation is referred to as a pledge; (3) The creditor has a duty to take reasonable care of the collateral in the creditor's possession.

On the other hand, the methods of proving the security agreement

pursuant to an authenticated record: (1) The record may be written or electronic, as long as it is signed, or marked electronically with a present intent to identify the debtor and adopt the agreement; (2) The description of the collateral must reasonably identify the property. That is to say, make it clear what property the creditor may repossess if the debtor defaults.

Another way of proving the security agreement is through control. (1) The security agreement may be demonstrated by the control if the collateral is a non-consumer deposits account, electronic chattel paper, or investment property; (2) Control basically means that the creditor has the right to sell or cash in collateral without further action from the debtor.

When it comes to attachment, the debtor has rights in the collateral: (1) a debtor cannot give a security interest in property without having rights in the property, such as ownership or identification to the contract; (2) the debtor cannot use another person's property as collateral without that person's consent or permission.

Attachment of after-acquired property, when using new property as collateral for an old loan: (1) the debtor can agree that new acquisitions of property will serve as additional collateral for an old loan; (2) this situation is often referred to as floating lien, and is very common for inventory.

However where the attachment of after-acquired property is dealing with a consumer good, there is an exception for a 10 day limitation from the creditor giving value: (1) An after-acquired property clause will work only for consumer goods acquired within 10 days of the creditor giving value.

There is also commercial tort claim exception. After Acquired Property Claims will not work with commercial tort claims.

With regard to future advancements in the scope of attachment: The debtor can agree that the collateral will serve as collateral for new loans, as well as the current loan. This is known as a line of credit arrangement.

Perfection: (1) The fight here is between the debtor and the creditor, go to the default analysis. The creditor will usually prevail if the creditor has attached; (2) If the fight between the creditor is between said creditor and a third party claiming the same collateral, then perfection is relevant; (3) perfection is the process by which the creditor protects the security

interest from most other claimants to the same collateral.

The elements of perfection: (1) Attachment where the creditor gives value, contract security agreement, and the debtor has rights in the collateral; (2) Act of perfection, which the appropriate act of perfection depends on the type of collateral. It may just be one method or it may be several.

An act of perfection: (1) Possession of the collateral by the creditor; (2) Filing of financing statement by the creditor; (3) Automatic permanent where attachment alone is sufficient; (4) Automatic Temporary, where attachment alone is sufficient for a short period of time; (5) control; and (6) notation of Security interest on Certificate of title.

Perfection by possession, almost all collateral may be perfected by possession.

Perfection by possession exceptions: (1) Accounts; (2) Deposit accounts; (3) Nonnegotiable documents; (4) electronic documents; (5) electronic chattel paper; (6) general intangibles.

Perfection by possession loss of possession: (1) The generally, if the creditor no longer has possession of the collateral, then perfection is lost; (2) 20 day exception for instruments, negotiable documents, and certified securities.

Filing of the Financing Statement, note that almost all collateral may be perfected by filing.

The exceptions are: (1) deposit accounts; and (2) money.

The requirements of a filing statement are: (1) names of the debtor and creditor; (2) addresses of the debtor and creditor (unless the financing statement is accepted by the filing office); (3) The debtor's authorization in an authentic record, and the authorization cannot be oral, however it can be electronic. The authorization of the financing statement is automatic if the debtor authenticated the underlying security agreement; and the debtor may authorize after the financing statement is filed; (4) The description may be in broader terms than the security agreement such as all assets; (5) Description of the land if the collateral is timber, minerals, fixtures, or crops.

The description of collateral in the financing statement may be in broader terms than the security agreement, such as all

assets. All Asset property is covered by the security agreement that fits within the description is automatically included.

Description of the land if the land must be included if the collateral is timber, minerals, fixtures, or crops.

Minor errors that are not seriously misleading will be excused. Note that it is a factual question as to what is minor, or what isn't minor.

In the filing of a financing statement the designation of the debtor is very important as the filing statement is filed under the debtor's name. If the debtor is an individual, then it is under the individual's name; if it is a registered organization, then it is the name under which the entity is organized; Note, that a trade name is insufficient unless it is extremely similar to the debtor's name. A trade name will work only if the name is so similar to the debtor's name that the financing statement would be discovered in a search of the Secretary of State's records in response to a request using the debtor's name.

Filing of a financing statement requires the following three factors when there is a change in the debtor's name: (1) the collateral the debtor has at the time of the name change, perfection will continue; (2) collateral that the debtor obtains within four months of the name change, perfection will continue; (3) collateral the debtor obtains after four months of name change the perfection ends unless there is a refiling under the new name within that four month period.

The Place of filing is generally as the secretary of state's office in Austin. Fixtures, minerals, timber to be cut will be in the county where the mortgage on real property estate would be filed.

The duration of a financing statement: (1) a financing statement is effective for five years from the date of filing; (2) The important exception is a recorded real property mortgage covering fixtures. These continue until the mortgage is released or satisfied.

A continuation statement is required to extend the effectiveness of a filing, the creditor should file a continuation statement within six months prior to the expiration date and before the five years expires.

Termination statements for consumer goods are required. The

creditor must file a termination statement in a timely manner:  
(1) within 20 days after the debtor's written demand, or;  
(2) within one month after there is no outstanding secured obligation or commitment to make advances, even without a demand from the debtor.

For non-consumer goods the termination statement is only upon the debtor's request. The creditor must provide the debtor with a termination statement within 20 days of written demand. The debtor has the responsibility of filing the termination statement, and must incur the cost.

A fraudulent filing is prohibited. Thus a person may not file a financing statement the person knows is forged, or contains a material false statement, or is groundless.

Automatic permanent perfection occurs when: (1) PMSI in consumer goods; (2) Assignment of insignificant amount of debtor's amounts; and (3) Sale of promissory notes.

Warning, for PMSI's for consumer goods that are not either certificate of title or items or fixtures.

Automatic Temporary perfection: (1) proceeds; (2) New value for instruments, negotiable documents, and certified securities; (3) delivery of instruments, negotiable documents, or certified security to the debtor for 20 days for certain purposes.

Furthermore proceeds are automatically perfected for 20 days from the debtor's receipt of the proceeds.

New value for instruments, negotiable documents, and certified securities: where the creditor is automatically perfected for 20 days a grace period to perfect using normal methods from the time of attachment will occur if the creditor gave new value.

Automatic Temporary perfection for delivery of instrument, negotiable document, or certified security to debtor for 20 days for certain purposes--Examples of these purposes include for sale, exchange, or presentation of the collateral.

Control occurs where: (1) investment property, non-consumer deposit accounts, electronic documents, and electronic chattel paper; (2) Defined- Control basically means that the creditor has the right to sell or cash in the collateral without further action from the debtor. Examples would be delivery in bearer form, or proper indorsements. If the deposit account, secured

party has control if the secured party is the bank in which the deposit account is maintained.

Generally notation on certificate of title covers the following items: (1) motor boats; (2) regular boats; (3) Manufactured housing (cars too).

Generally perfection by notation on certificate of title for collateral on consumer or equipment must be physically noted of security interest on the certificate of title.

Notation on certificate of title will be perfection if the collateral is inventory. Thus file or take possession, for example, if the debtor is a dealer, and the creditor should perfect by filing or taking possession of the cars.

There are special rules for proceeds: (1) generally perfection continues for 20 days; (2) When perfection continues beyond 20 days. Then...

(1) Same office--original security interest perfected by filing and a financing statement covering the proceeds would be filed in the same place as the original collateral, then it is "tracable" meaning applicable; (2) Identifiable cash proceeds work only if identifiable; and (3) Proceeds perfected within the 20 day period, then the perfection could occur with out further action on the creditor's part, or the creditor may need to take action to perfect.

If it involves multi-state transactions, then the issue is what state's version of the UCC is used to determine whether a creditor is perfected?

Generally, the law of the state where the debtor is located : (1) individual--principal residence; (2) Registered Organization--law of state where organized; (3) Unregistered organizations--either the place of business, but if more than one place of business, then the location of the chief executive offices.

However there are exceptions where the creditor must follow the law of the collateral's location: (1) security interests perfected by possession; (2) fixtures; (3) timber; and (4) Agricultural liens--here the law of the state where the farm product covered by the lien is located.

Other exceptions include: (1) Certificate of title items--the

law of the state which issued the most recent certificate of title controls; (2) deposit accounts--the law of the state in which the bank has its chief executive office.

Generally if the debtor moves, then perfection will continue for a four month period.

If the debtor or the collateral changes states then: (1) perfection by possession the perfection continues as long as perfected under the new state's law; and (2) Certificate of title items, the perfection continues as long as it would have under the original certificate of title.

Priorities are tested all the time. The crux of Secured Transactions is the determination of who is fighting with Article 9 creditor, or for the collateral and then decides who prevails.

Determining the priorities requires a two step process: (1) Classify the persons claiming the collateral--thus who they are; (2) Determine who prevails.

If more than two claimants are involved, pick any two, determine who has priority, and then put the winner against one of the remaining claimants. Continue in a similar manner until you determine who has the top priority. Repeat the process to determine number two, three, etc.

The subordination rule. Note that by contract, the competing parties may agree to a priority order different from the normal rules. This is known as the subordination rule.

In the case of secured creditor vs. Unsecured or general creditor: the secured creditor prevails. The perfected status of secured creditor is irrelevant in such cases.

In cases of secured creditor vs. Secured creditor: (1) if both creditors are unperfected, then the first to attach prevails; (2) If one creditor is perfected, then the perfected creditor wins.

However, if both such secured creditors are perfected, then the general rule is that the first creditor to either file or perfect wins. The first creditor to do the first filing or perfecting prevails, not both. No matter which creditor first had the security agreement with the debtor. No matter which creditor attached first. No matter which creditor perfected

first, if one creditor filed before that perfection. Knowledge of Creditor A who filed first that Creditor b has subsequently filed and perfected, but before creditor a perfects, is irrelevant.

However if one of the creditors has a PMSI in goods (other than inventory and livestock) The PMSI creditor prevails even though the second to file if it is perfected: 91) at the time the debtor receives possession of the collateral, or ; (2) within 20 days of when the debtor received possession of the collateral.

However, if one creditor has a PMSI in inventory, the PMSI creditor prevails if: (1) the PMSI creditor perfected at the time the debtor receives possession of the inventory, and; (2) proper notice is given to holders of conflicting security interests.

Authenticated notification to all creditors who have already filed with respect to the collateral is required for a PMSI in inventory, when there are holders of conflicting security interests. The notice must: (1) explain that the creditor is obtaining a PMSI in inventory; (2) Describe the collateral; and (3) be given before the debtor receives possession of the inventory. The notice is effective for deliveries of the same type of collateral for five years.

Priorities, Secured creditor vs. secured creditor, exception PMSI in livestock. Here the approach is to basically apply the same rules as for PMSI in inventory.

The Deposit accounts exception states that the secured party with control prevails.

The exception for investment property states that the secured party with control over investment property has priority over a secured party who does not have control, such as a secured party who perfected by filing.

Now comes priorities between secured creditor and donee. if the debtor makes a gift of the collateral to a donee, the collateral remains subject to the security interest in the donee's hands.

However, in the case of a secured party vs. a purchaser with respect to priorities. Generally, the secured party prevails. That is, the presumption that the secured party wins is a rebuttable presumption whereby, the purchaser may rebut it if there is an exception. If the debtor had permission to sell the

collateral, then the purchaser will prevail.

If the secured party is unperfected at the time of purchase: (1) Then generally a purchaser wins if: (a) The buyer gives value; (b) the buyer receives delivery of the item; and (c) the buyer has no knowledge of a security interest at the time of delivery; (2) PMSI exception: If PMSI creditor perfects within 20 days after the debtor receives the collateral, then by the time or after the debtor sells the collateral to the purchaser, the creditor will prevail over the gap purchasers.

In the case of a buyer in the ordinary course of business: A buyer in the ordinary course of business can prevail even over a perfected creditor if the following requirements are satisfied: (1) Good faith; (2) Without knowledge of security interest violation; (3) Purchase of goods that are not farm products; (4) Ordinary business; (5) Security interest created by the seller; (6) Creditor not perfected by possession.

Good faith is honesty in fact and observance of reasonable commercial standards.

An ordinary purchase: The purchase must be made from a person in the business of selling goods of the kind, for example out of the seller's inventory.

Priorities Secured Creditor vs. Purchaser; consumer purchasers of consumer goods the garage sale or Ebay Rule: Here the purchaser prevails if: (1) Consumer goods in the seller's hands; (2) Consumer goods in buyer's hands; (3) Buyer has no knowledge of a security interest; (4) Buyer pays value (thus it is not a gift); (5) Creditor is not perfected by possession; (6) The Creditor's interest is un-filed prior to purchase.

In the case of buyers not in the ordinary course of business vis-a-vis future advance: (1) the creditor gives more money to the debtor based on collateral that the debtor has already sold to a purchaser who does not qualify as a buyer in the ordinary course of business; (2) A non-buyer in the ordinary course of business can prevail over a secured creditor for future advance amounts (not the prior advances) made after the first of:

(1) Secured creditor obtains knowledge of the purchase; or, (2) 45 days have elapsed from the date of the purchase.

Secured party vs. purchaser the holder in due course of negotiable instrument case: A holder in due course will prevail

over earlier perfected interests in the negotiable instruments.

Now we move to secured creditors vs. Lien creditors: A lien creditor is a general or unsecured creditor who has acquired a judicial lien by a levy on the debtor's property. Note that the term also includes the bankruptcy estate.

The general priority rules for such cases are: (1) if the secured creditor is unperfected at the time the lien attached, then the lien creditor prevails; (2) if the secured creditor is perfected at the time the lien attached, then the secured creditor prevails.

However there is an exception for PMSI Interest. If a PMSI creditor perfects by filing within 20 days after the debtor receives possession, the creditor will defeat the lien creditor who obtained their liens in the gap period.

In the case of future advances, the secured creditor will lose priority to a lien creditor for future advances after both of the following two occurrences: (1) the secured creditor obtains knowledge of the lien, and; (2) 45 days elapse from the date of the lien.

Now comes the Secured creditor vs. the Statutory Mechanics' Lien. The statutory lien prevails if the following conditions are satisfied: (1) The person furnished services or material with respect to the goods covered by the security interest; (2) Furnishing was in the ordinary course of business; (3) the collateral is in the possession of the statutory lien holder. For example a car garage in possession of the bank.

Proceeds: The priority for the proceeds is the same as the priority in the original collateral as long as the security in the proceeds is perfected.

Fixtures Secured party vs. Holder of the Real Property Mortgage. A fixture is defined as: (1) Ordinary building materials (such as brick, lumber, nails, siding, shingles, wiring, pipes, etc.) cease to be goods when incorporated into a structure and become real property; (2) Thus, a creditor with a security interest in these ordinary building materials loses its security interests once construction occurs; (3) a fixture is a good which is not completely integrated into the building, although it is so related to the real estate that an interest in it arises under real estate law; (4) a fixture can be removed but some damage will occur to the realty. For example, hot water heater, fridge,

or tub.

Generally a secured party may win if: (1) perfected before real estate interest is recorded, and; (2) perfected with a fixture filing.

A fixture filing is a financing statement which meets the following additional requirements: (1) it describes the real property; (2) It is filed in the office where a mortgage on the real property would be recorded.

The PMSI exception: the PMSI creditor, even though perfected after real property interest is on record, can prevail if: (1) PMSI creditor perfected by fixture filing; (2) perfected within 20 days; (3) competing real estate interest is not a construction mortgage.

A construction mortgage is the loan which enabled the whole building process to begin and is not defeated by a later PMSI.

In the case of readily removable collateral: Sometimes there is a debate as to whether an item is a fixture or merely a good. Generally, if the good is readily removable, it will be treated as a regular good, rather than a fixture, and thus may be perfected without a fixture filing: Example: Copy machine in an office.

In the case of judicial liens in the fixtures-secured party vs. holder of real property mortgage scenario; there is no special preference. A security interest in fixtures that is perfected in any manner prevails over a later acquired judicial lien, even if the perfection was not done via a fixture filing.

Crops: A perfected security interest in crops has priority over a conflicting interest in the land on which the crops grow. It does not matter who filed or perfected first.

Bankruptcy of the debtor may change the normal priority rule. This is especially true in the case of preferences.

Remedies of Secured party upon the debtors default--Default is not defined by the UCC. Thus clearly default means not paid but the term may include other things specified in the security agreement, such as taking the collateral out-of-state without permission, or not keeping the collateral insured.

For repossession: (1) Upon default, the creditor may repossess;

(2) no judicial process is needed, and self-help remedy is allowed; (3) The creditor does not need to give the debtor notice; and, (4) the limitation on repossession is that there can be no breach of the peace.

Examples of breach of the peace include: (1) not breach--repossess car in street; (2) not breach--repossess car in driveway; (3) breach of peace--DON'T TAKE MY CAR!!!' (4) breach of peace--breaking and entering to take the car; (5) Breach of peace--threat of violence; (6) Breach of peace--constructive force (such as dressing as a police officer); (7) Not breach of peace--lying or trickery.

Breach of Peace; creditor cannot delegate the duty not to breach the peace. This means that the creditor cannot delegate the breach of the peace liability to the repo man. Therefore, if the repo man breaches the peace, the creditor is STRICTLY LIABLE even if the repo man is an independent contractor. This liability could be for conversion of the repossessed item, actual damages, and even punitive damages.

After a successful repossession the creditor has the following options: (1) resell the collateral, sue for deficiency, and then give surplus to the debtor; or (2) Strict foreclosure, keep the collateral and call things square.

Sale of collateral by the creditor general steps: (1) notice of the sale; (2) Debtor's right to redeem; (3) standard of care; (4) Ability of creditor to purchase at resale; (5) title of purchaser at resale; (6) Application of resale proceeds; (7) Deficiency; (8) Penalty for not complying with resale requirements; (9) If collateral accounts or instruments.

Sale of collateral by the seller usually requires notice except when: (1) perishable items; (2) collateral threatening to decline speedily in Value; (3) Collateral is customarily sold on a recognized market.

The contents of the notice: (1) description of the debtor and secured party; (2) description of the collateral; (3) method of sale; (4) statement that the debtor is entitled to accounting and the charge, if any; (5) time and place of public sale; the time after which a private sale will be made (earlier date of sale).

If for consumer goods the notice must also: (1) explain that the debtor is liable for deficiency; (2) telephone number of

the person from whom the debtor can obtain the amount needed to redeem collateral; (3) telephone number or address from which the debtor can get additional information about the sale.

The notice must be sent a reasonable amount of time before the sale. It is a fact question as to what is reasonable time but in a non-consumer transaction, 10 days or more before the sale is considered reasonable.

The person to receive notice is: (1) the debtor unless the debtor has waived notice in an authenticated agreement after default occurs; (2) Sureties; (3) If collateral is not consumer goods--notice to creditors who have perfected by filing, notation on certificate of title, or who have given notice to reselling creditor.

The debtor has the ability to cure the default and regain the collateral if certain requirements are met: (1) creditor has not yet sold or entered into a contract to sell collateral; (2) Strict foreclosure has not yet occurred; (3) the debtor has not waived the right to redeem after default; (4) debtor must tender fulfillment of all obligations secured by the collateral; (5) the debtor must tender the creditor's reasonable expenses (repo costs, storage, getting ready for sale).

Sale of collateral by the seller standard of care consideration: All aspects of the sale, that is, the method, manner, time, place, and terms, must be commercially reasonable. It is a fact question as to whether the sale was commercially reasonable. Merely because a better price could have been obtained does not make a sale unreasonable, but if the difference in price is substantial, the sale will be closely analyzed. The burden of proof is on the creditor to show commercially reasonable standards of the sale in a deficiency suit.

The creditor has the ability to purchase at resale if: (1) public sale or auction, then yes if it is competitive bidding; (2) private sale only if: the collateral is customarily sold in a recognized market; or, collateral is subject to widely distributed standard price quotations.

Title of purchaser at resale: the reselling creditor warrants title, possession and quiet enjoyment of the collateral by the purchaser unless the creditor takes steps to disclaim such warranties.

the following is the application of resale proceeds: (1)

reasonable expenses of reselling creditor; (2) satisfaction of the debt; (3) satisfaction of subordinate creditor; (4) Surplus, if any, to the debtor.

Deficiency: the creditor is unsecured for the deficiency amount.

Penalties for non compliance with resale requirements include: (1) creditor liable for actual damages (from the debtor or of another creditor); (2) Consumer goods (the creditor is automatically liable for an amount equal to finance charge plus 10% of the principal); (3) effect on creditor's ability to recover deficiency: (a) Consumer transaction poses absolute bar to recovery of deficiency; (b) non-consumer transaction forms rebuttable presumption that value of collateral was equal to the amount of debt( secured creditor may prove otherwise and still recovery deficiency).

If collateral accounts or instruments are involved then the creditor directs the obligor to make payments directly to the creditor, rather than to the debtor.

In strict foreclosure the creditor retains the collateral in total satisfaction of the debt. In non-consumer situations, the creditor may retain the collateral in total or partial satisfaction of the debt.

The prerequisites of strict foreclose: (1) debtor consents; (a) express the debtor agrees in an authenticated record made after default, or; (b) implied the debtor fails to object to the creditors proposal to strict foreclosure within 20 days of when the creditor sent notice; (2) the creditor sends authenticated notice to retain collateral to: (a) the debtor, unless the debtor has waived notice in an authenticated agreement made after default; (b) if collateral is no consumer goods, the notice to creditors who have perfected by filing, notation on certification of title, or who have given notice to the creditor.

If the debtor or another creditor objections in writing within 20 days the creditor may not keep the collateral and must conduct a resale.

There are three exceptions to strict foreclosure: Exception for high equity (debtor has paid 60% of price) Consumer goods-- resale is necessary within 90 days of repossession; unless after default there is a written notice allowing strict foreclosure.